No. 89-395

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

THE DOW CHEMICAL COMPANY,
Petitioner,

v.

ANN I. GREENHILL, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

—AND APPENDIX—

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August 30, 1989

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QUESTIONS PRESENTED

1) Did the trial court abuse its discretion when, without a hearing or explanation, it denied petitioner's request for a new trial which was based on the post-trial, newly-discovered evidence that respondent's sole expert witness had testified falsely at trial?

2) Did the United States Court of Appeals for the Fifth Circuit, by conducting a *de novo* review, establish an unacceptable judicial procedure for both trial and appellate courts for resolving the issue of false trial testimony?

LIST OF PARTIES

Petitioner is a Delaware corporation with its principal place of business in Midland, Michigan. It has no parent company.

NOTE: Petitioner's affiliates and subsidiaries, as of July, 1989, (other than wholly owned subsidiaries) are shown below.[1]

Respondents below were initially James Edward Greenhill and his wife, Ann I. Greenhill. Following Mr. Greenhill's death, Ann I. Greenhill filed an Amended Complaint for

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[1] Alamo Land Company Inc.; Arabian Chemical Company Limited; Compagnie des Services Dowell Schlumberger; DCU/LB TRUST; Dow International Service Center (Belgium); Transformadora de Etileno S.A.; Chimtrade; Vorakim Kimya Sanayi Ve Ticaret A.S. (Turkey); Dowell Schlumberger Canada Incorporated; Fort Saskatchewan Ethylene Storage Limited Partnership; H-D Tech Inc.; Wabiskaw Explorations Ltd.; Cromary Petroleum Company Limited; Merrell Dow Pharmaceuticals Limited; MDP (Holdings) Ltd. (UK); Dow Quimica de Colombia S.A.; Chief Shipping Company; Ulsan Pacific Chemical Company Ltd.; Dow Corning Corporation; Dow Holdings Inc., Dow Rheinmuenster GmbH, Dow Service GmbH (West Germany), Dow Stade GmbH, Dow Service GmbH (West Germany), Dow Vertriebsgesellschaft mbH, Dow Service GmbH (West Germany), Viopol S.A.; Dow Italia S.p.A., Oronzio de Nora Technologies S.pA.; Dow Kakoh Kabushiki Kaisha; Dow Quimica de Colombia S.A.; Dow Quimica S.A., Embalagens e Artefatos Plasticos Ltda, Family Com. e Ind. de Produtos de Limpeza Ltda., Spuma Pac-Industria e Comercio de, Embalagens e Artefatos Plasticos Ltda; Dowell Schlumberger Corporation (Panama); Dowell Schlumberger Incorporated (Delaware); El Dorado Terminals Company; Joliet Marine Terminal Trust Estate; M. D. Kasei Limited; Funai Pharmaceuticals Company Ltd (Japan); First Chemical Factoring S.p.A. (Italy); Ecuatorianos (L.I.F.E.) (Ecuador); Merrell Dow Frane et Cie (S.N.C.) (France); Merrell Dow Pharma GmbH (West Germany), Dow Service GmbH; Merrell Dow Pharmaceuticals Limited (UK); Fort Saskatchwan Ethylene Storage Corporation (Canada); Oronzio de Nora S.A., (Lugano); Oronzio de Nora Technologies B.V.; P. T. Pacific Chemicals Indonesia; Pacific Chem-

(footnote continued on following page)

wrongful death on behalf of herself, individually, and on behalf of the heirs of the estate of James Edward Greenhill, deceased.

(footnote continued from preceding page)

icals Berhad, Pacific Cable Products Sendirian Berhad; Pacific Chemicals (Pakistan) Ltd.; Pacific Plastics (Thailand) Limited; Petroquimica-Dow S.A.; Scotdril Offshore Company; The Cynara Company; Eurosemences, S.A. (France). Vorokim Kimya Sanayi Vo Ticarot A.S.; Zip Pak Incorporated.

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OCTOBER TERM, 1989

THE DOW CHEMICAL COMPANY,

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v.

ANN I. GREENHILL, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner THE DOW CHEMICAL COMPANY ("Dow") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in these proceedings on April 4, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 868 F.2d 1428 (5th Cir. 1989) and is reprinted in the appendix, p. 1a.

The United States District Court for the Eastern District of Texas (Hall, D.J.) did not issue a memorandum opinion on the judgment or on petitioner's post-trial motions and request for a hearing.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its opinion and judgment in this case on April 4, 1989. Petitioner's timely request for a rehearing was denied by Order entered June 6, 1989.

Petitioner did not request an extension of time to file this petition. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND COURT RULES INVOLVED

28 U.S.C. § 1291.

Final decisions of district courts.

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of Canal zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Fed. R. Civ. P. 59.

New Trials; Amendment of Judgments.

> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an

action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

Fed. R. Civ. 60.

Relief From Judgment or Order

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been

satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

Plaintiffs originally misfiled this case on October 15, 1979, as part of a civil action then pending in the federal district court for the Eastern District of Texas, Marshall Division, entitled *Allen Peteet, et al.* v. *Dow Chemical Company, et al.*[2] Jurisdiction for the *Greenhill* case was

[2] *Peteet* was a Viet Nam veterans' suit complaining of exposure to agent orange. When the Multidistrict Litigation Panel transferred the case to New York as part of the "Agent Orange" suit, Greenhill's case went along with it, where it remained for some six years. When "Agent Orange" was settled, the *Greenhill* case was sent back to the federal district court in Texas. Mr. Greenhill was not a Viet Nam veteran nor was he ever exposed to agent orange.

properly based on 28 U.S.C. § 1332. It was eventually tried before a federal district court jury in Marshall, Texas, as a product liability wrongful death action. The jury returned a verdict for Greenhill and awarded $1.5 million in damages.

Dr. Teitelbaum was Greenhill's sole medical expert to testify on the ultimate issue in the case: whether Dow's product caused Mr. Greenhill's disease and death. Dr. Teitelbaum's false trial testimony and the events which took place in the courtroom during a critical portion of it are the foundation for this petition.

Pre-trial Deposition

Dr. Teitelbaum was deposed in this case on June 15, 1987, five months before trial, and trial counsel for both sides were present. At the deposition, Dr. Teitelbaum identified the medical records he relied on in forming his opinion. These records were marked as "Exhibit 2" and were attached to the deposition. *See* appendix, pp. 22a-23a. Greenhill's trial counsel further identified "Exhibit 2" as the records which were given to Dr. Teitelbaum to review for his opinion. *See* appendix, p. 24a. Later in the deposition, when Dow's counsel was questioning him, Dr. Teitelbaum specifically referred to the medical records from a Dr. Walters. *See* appendix, p. 25a. Dr. Walters' records were part of "Exhibit 2."

"Exhibit 2" contained the medical records for a patient named JOSEPH MOSS, not the medical records of Greenhill, the plaintiff. There were some reports from Mr. Greenhill's pathologist contained in "Exhibit 4," which Dr. Teitelbaum also referred to in his deposition. *See* appendix, p. 25a.

At Trial

On direct examination by Greenhill's counsel (Mr. Baldwin), Dr. Teitelbaum stated that one of the bases, supporting his expert opinion, was his review of Mr. Greenhill's medical records. 6 R. 122. *See* appendix, p. 26a. Dow's counsel (Mr. Ortego) conducted a cross-examination of the doctor. Dow's counsel produced "Exhibit 2" (from the doctor's pre-trial deposition) and asked Dr. Teitelbaum about a Dr. Walters. Dr. Teitelbaum answered that he believed that Dr. Walters was *Greenhill's general practitioner*, and that he recalled discussing this same matter at his deposition. 6 R. 217. *See* appendix, p. 27a. When shown "Exhibit 2" (the medical records of a JOSEPH Moss), Dr. Teitelbaum denied ever having seen these records before and denied that they were records he ever had in his possession. He said repeatedly he had no idea who Mr. Moss was. 6 R. 219-221. *See* appendix, pp. 28a-32a.

At this critical point in the cross-examination, the judge intervened, questioned both the Dow counsel and Dr. Teitelbaum about "Exhibit 2" and implied, in the presence of the jury, that Dow's counsel was engaged in "hanky-panky" and, if there was "hanky-panky" going on, he would deal with it if it were true. 6 R. 225. *See* appendix, pp. 32a-34a. When the court questioned Dr. Teitelbaum, again in the presence of the jury, Dr. Teitelbaum further denied knowing anything about JOSEPH Moss, having anything to do with such a person or having ever given testimony on behalf of Mr. Moss. 6 R. 221-226. *See* appendix, pp. 30a-34a.

Fearing that the jury may have been prejudiced by the judge's remarks about "hanky-panky" by the Dow counsel, Dow requested the court to give a curative instruction to

the jury *before* Dow put on its defense. The judge denied this request, deferring such instruction to the end of the trial when he would charge the jury. 7 R. 2-7. *See* appendix, pp. 35a-39a. In the jury charge, the judge instructed the jury that Dr. Teitelbaum did nothing improper at his deposition or at trial. 7 R. 299. *See* appendix, pp. 40a-41a.

Post Trial

Immediately after the trial, Dow discovered that Dr. Teitelbaum was very familiar with a JOSEPH MOSS, his medical records and condition; and, in fact, that Dr. Teitelbaum was the retained expert on behalf of Mr. Moss in a case then pending in Texas state court, captioned *Joseph W. Moss, Jr.* v. *The Charter Oak Fire Insurance Company.* Dow further discovered that Dr. Teitelbaum was deposed in that case only one day after he had been deposed in *this* case (only about 5 months before this trial).

Based on newly-discovered evidence that Dr. Teitelbaum had testified falsely at *this* trial, Dow immediately filed a Motion for a Judgment Notwithstanding the Verdict, or in the Alternative, for a New Trial,[3] asking the court for an expedited hearing on the matter. R. 35-78. The court summarily denied Dow's motion and request for a hearing, without a record or written memorandum. R. 66. *See* appendix, p. 21a.

The Fifth Circuit found that Dr. Teitelbaum had testified falsely but affirmed the judgment below. 868 F.2d 1428 (5th Cir. 1989). *See* appendix, pp. 1a-18a. Dow's timely request for a rehearing was denied. *See* appendix, pp. 19a-20a.

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[3] Dow's motion for a new trial was based on Fed. R. Civ. P. 59 and Fed. R. Civ. P. 60.

REASONS FOR GRANTING THE WRIT

I.

It is an abuse of discretion *per se* when a trial court conducts no hearing and provides no explanations for denying petitioner's request for a new trial based on the false trial testimony of respondent's sole expert witness on the ultimate issue in the case.

Absent an abuse of discretion, matters left to the discretion of a trial court should not be set aside. The Fifth Circuit's opinion herein underscores that maxim:

> We will not overturn the district court's refusal to grant a motion for a new trial on the basis of newly discovered evidence absent a clear abuse of discretion. *Osburn* v. *Anchor Laboratories, Inc.*, 825 F.2d 908, 917 (5th Cir. 1987). In *determining* whether to grant this motion, *the district court should consider* whether the new facts (1) would probably change the outcome; (2) could have been discovered earlier with due diligence; and (3) are merely cumulative or impeaching. *Johnston* v. *Lucas*, 786 F.2d 1254, 1257 (5th Cir. 1986). (*See* appendix, p. 15a. Emphasis added).

Petitioner agrees with the maxim. However, a district court must provide *explanations* for its actions. Failure to do so is an abuse of discretion, which invokes this Court's corrective measures under its supervisory powers.

Despite the fact that Dow presented to the trial court uncontroverted evidence of Dr. Teitelbaum's false trial testimony, the court *summarily* denied Dow's request for an expedited hearing on this serious matter; and, without

any explanations, the court denied Dow a new trial.[4] This is reversible error, which this Honorable Court needs to correct, so that other trial courts do not commit the same error. The Fifth Circuit has recognized this error previously in another case, but failed to apply it in this case in this context.

The Fifth Circuit has previously addressed a trial court's abuse of discretion, stating:

> We can say with certainty that a district court abuses its discretion when it summarily denies or grants a motion to dismiss without either written or oral explanation. We can also state that a district court abuses its discretion when it fails to address and balance the relevant principles and factors of the doctrine of forum non conveniens. *In Re Air Crash, Disaster Near New Orleans, Louisiana, on July 9, 1982.* 821 F.2d 1147, 1166 (5th Cir. 1987).

The Fifth Circuit's reasoning in *In Re Air Crash* is quite clear as to why a "written or oral explanation" from the trial court is needed: appellate courts do not and should not conduct *de novo* reviews; when trial courts act summarily, the appellate court will find an abuse of discretion "with certainty." That is the better rule, and it is the rule which petitioner urges this court to enunciate under its supervisory powers.[5] The Fifth Circuit deviated from its own, well-reasoned standard.

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[4] Dr. Teitelbaum never submitted an affidavit throughout any of the post-trial or appellate proceedings, explaining his testimony or denying its falsity.

[5] Petitioner has found no cases in other Circuits which support a trial court's *summary* action under these circumstances. Other Circuits have had the trial court's hearing record or memorandum for review. *Compare Harre* v. *A. H. Robbins, Co.*, 750 F.2d 1501 (11th Cir. 1985); *United States* v. *Wallace*, 528 F.2d 863 (4th Cir. 1976); *United States* v. *Butler*, 567 F.2d 885 (9th Cir. 1978).

By issuing a denial without written or oral explanation, the trial court adopted an unacceptable judicial procedure for addressing the false trial testimony of Dr. Teitelbaum. The trial court should have held a hearing on the matter (as requested by Dow), garnered all the facts and issued its written or oral decision. By doing otherwise, the court acquiesced in the falsehood, silently sanctioned it and permitted an unjust result.[6]

This Court is presented with an opportunity, as the ultimate guardian of the integrity of the judicial system, to provide proper guidance to the bench, the bar and expert witnesses: false testimony will not be tolerated and courts will act swiftly and firmly by conducting a hearing on the record and providing their findings thereon. Anything short of that should be viewed as an abuse of discretion and an erosion of public trust and confidence in the judicial system.

II.

The Court of Appeals should not endorse a trial court's *per se* abuse of discretion, conduct a *de novo* review, and sanction an unacceptable judicial procedure for resolving the issue of false trial testimony.

When a trial court, as here, abuses its discretion *per se*, the Court of Appeals should not endorse it. Left with no factual or legal bases from the trial court as to why it denied Dow's motion for a new trial, the Fifth Circuit was

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[6] Dow's defense and, particularly its cross-examination of Dr. Teitelbaum, would have been quite different had it known that Dr. Teitelbaum was testifying falsely. When this testimony took place, the judge, in the presence of the jury, implied that Dow (not Dr. Teitelbaum) was trying to pull some kind of "hanky-panky" and that he would deal with it right then and there if it were true. *Inadvertently*, the judge destroyed Dow's credibility while aiding Dr. Teitelbaum's deceptions. 6 R. 225. *See* appendix, pp. 32a-34a.

compelled to do an improper *de novo* review of the false trial testimony; and, with no written or oral explanation from the trial court, it was required to weave its conclusions from whole cloth. The Fifth Circuit acknowledged that Dr. Teitelbaum, a professional expert witness,[7] testified falsely at trial, stating:

> Dr. Teitelbaum *apparently* became *confused* when he saw the Moss records in exhibit 2 and stated that he did not know Joseph Moss. 6 R. 219-21. This testimony was false since Moss was a patient of Dr. Teitelbaum. (Emphasis added. *See* appendix, p. 14a.)

The Court then went on to add:

> The further revelation that Dr. Teitelbaum *had forgotten the name* of one patient could not have affected the jury's verdict. Dow was not hurt by Dr. Teitelbaum's *confusion*. (Emphasis added. *See* appendix, p. 15a.)

Nothing in the record below supports the Fifth Circuit's reasoning that Dr. Teitelbaum was confused or simply forgot a patient's name or that Dow was not hurt by such confusion.[8]

The basis for the Fifth Circuit's reasoning should have been provided by the trial court in a post-trial hearing with

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[7] Dr. Teitelbaum makes almost 50% of his substantial annual income from testifying in and consulting on "medical-legal" work. 6 R. 142. On the average he is deposed in such cases about 25 times per year. 6 R. 139. His Denver medical clinic even employs a full-time paralegal. 6 R. 136. *See* appendix, pp. 41a-42a, and 43a, respectively. Dr. Teitelbaum had to rely upon medical records quite extensively in forming his opinion, since he never saw, treated, or examined Mr. Greenhill nor spoke to either Mr. Greenhill or any member of the Greenhill's family or any of Greenhill's doctors. 6 R. 133-4. *See* appendix, pp. 43a-44a.

[8] See n. 6, above, as to how Dow was harmed.

a written or oral explanation of its findings and conclusions. Instead, the trial court provided no explanation for the false testimony or its purported lack of impact on the jury.

The Fifth Circuit's *de novo* reasonings underscore the need for a written or oral explanation: with nothing to *review*, the appellate court must speculate. This Court can correct the situation and greatly assist appellate courts in the future, by providing for a judicial guideline that mandates a hearing and written or oral explanations from the trial court under these serious circumstances.[9]

The jury in this case never knew the truth about Dr. Teitelbaum's falsehoods or the questionable basis for his expert opinion. Dow was denied an explosively effective closing argument, not by reason of its own fault, but because Greenhill's expert "dodged the bullet" through false testimony. The Fifth Circuit allowed this to happen by endorsing the trial court's *per se* abuse of discretion and by acquiescing in an unacceptable judicial procedure for resolving the issue of false trial testimony.

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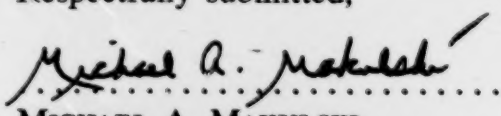
[9] The argument that this would place an additional burden on an already, over-worked trial system rings hollow. Mandatory hearings need not be imposed for every discretionary act by a trial judge. This Court can fashion a narrow ruling to fit the circumstances of this case and other cases of false trial testimony, where Courts of Appeals need *something* to review, other than a summary denial.

CONCLUSION

For these reasons, this petition for certiorari should be granted. If Dow is correct in urging that the district court abused its discretion in denying Dow's request for a new trial and the Fifth Circuit endorsed that abuse and sanctioned an unacceptable judicial procedure, then this Court should reverse and remand the case to the district court for a new trial.

Respectfully submitted,



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August 30, 1989

APPENDIX

Opinion and Decision of Court of Appeals

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

April 4, 1989

No. 87-6314

ALLEN PETEET, et al.,

Plaintiffs,

ANN I. GREENHILL, Individually and On Behalf of the Heirs of the Estate of JAMES EDWARD GREENHILL, Deceased,

Plaintiffs-Appellees,

DOW CHEMICAL COMPANY,

Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Texas.

Before GEE, SNEED,* and WILLIAMS, Circuit Judges.

SNEED, Circuit Judge:

Dow Chemical Co. ("Dow") appeals a jury verdict in favor of plaintiffs finding Dow liable in the death of James Greenhill. We affirm.

I.

FACTS AND PROCEEDINGS BELOW

In 1976 and 1977, James Greenhill was seasonally employed by the United States Forest Service in Oregon.

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* Circuit Judge of the Ninth Circuit, sitting by designation.

Although primarily a fire fighter, he occasionally participated in a weed control project called "hack and squirt." This project required Greenhill to apply herbicides manufactured by Dow, exposing him to 2,4-dichlarophenoxyacetic acid [sic] (2,4-D). Greenhill's exposure to 2,4-D ceased in 1978 when he was transferred to another park. A year later, Greenhill was diagnosed with Hodgkin's disease. He died seven years later.

Greenhill's surviving spouse, son, and parents sued Dow in the Eastern District of Texas.[1] The case was transferred to the "Agent Orange" products liability action in the Eastern District of New York. After settlement of that case, in 1986, Greenhill's action against Dow for the exposure to 2,4-D was returned to Texas.

The case was tried in November and December, 1987. A jury awarded the plaintiffs $1.5 million in damages. Dow appeals.

II.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1332. This court's jurisdiction rests on § 1291.

III.

DISCUSSION

A number of issues of various weights are raised by this appeal. It is uncertain whether this number could have

[1] Mr. Greenhill died after the suit was filed and the present parties were substituted.

been reduced by a more crisp and orderly process than appears to have been employed in this case. It is likely, however, that a more crisp and orderly process would have framed the issues more precisely. The difficulty is that while such a process would have simplified our task, it is by no means clear which party would have been favored or disfavored thereby. We now turn to the issues.

A. *Notice of Appeal*

Plaintiffs seek to narrow the issues properly before us by asserting that Dow can appeal only the court's order denying the motion for JNOV and the motion for new trial because Dow's notice of appeal only covered these issues. Our task cannot be reduced so easily. Fed. R. App. P. 3(c) requires appellants to designate the judgment or order to be appealed. In its second notice of appeal, Dow stated that it was appealing from the "judgment entered in this action," *and* from the denial of the motion for JNOV and motion for new trial. Notices of appeal should be liberally construed. *See Ingraham* v. *United States,* 808 F.2d 1075, 1080 (5th Cir. 1987). Dow's notice effectively designated the entire record for appeal.

B. *Dr. Teitelbaum's Testimony*

Dow strongly attacks the plaintiff's principal witness, Dr. Teitelbaum. It argues that the trial court erred in admitting his testimony which was the only evidence that 2,4-D caused Greenhill's Hodgkin's disease.

Dr. Teitelbaum's qualifications are substantial. He is a medical doctor and certified in toxicology. 6 R. 11-12, 18. He has had various academic appointments in toxicology and poison control; he has consulted with several corpora-

tions on the proper handling of poisonous materials; and he has served on state and federal government advisory committees. 6 R. 11-12, 15, 17. He also testified that he has published 38 or 39 articles on toxicology, 6 R. 19, and that he has extensive experience in evaluating lymphoma to determine "whether there may or may not have been an environmental or occupational cause" for the disease, 6 R. 20.

As to his preparation for this case, Dr. Teitelbaum testified that:

> I've reviewed the medical records of Mr. Greenhill, as much as we have been able to get. I have reviewed his deposition. I have reviewed the medical literature on the subject. I've looked at the slides. I had the slides looked at by colleagues. . . .

6 R. 21.

Dr. Teitelbaum's testimony was extensive. He first testified about the difficulty of diagnosing Hodgkin's disease, both in general and in this case. 6 R. 36. On the basis of seven reports by a number of pathologists, Dr. Teitelbaum testified that Greenhill's condition was "most consistent with Hodgkin's disease." [2] 6 R. 51. Next, Dr. Teitelbaum discussed twenty-two scientific articles linking 2,4-D with various diseases including cancer and, specifically Hodgkin's disease. 6 R. 115-21. He concluded that "to a reasonable

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[2] To positively diagnose Hodgkin's disease, a pathologist must find a "Reed-Sternberg" cell in a tissue analysis. 6 R. 42. None of the pathologists were able to find the characteristic cell in any of Mr. Greenhill's tissue slides. 6 R. 44. However, the consensus among all of the pathologists consulted by Dr. Teitelbaum was that Mr. Greenhill's slides were consistent with a diagnosis of Hodgkin's disease. 6 R. 21, 50.

medical certainty, Mr. Greenhill's exposure to . . . 2,4-D was a significant, contributing cause to his cancer and his death." 6 R. 122.

Dow raises a number of objections about Dr. Teitelbaum's testimony. We will address each in turn.

The trial court's admission or exclusion of expert testimony will not be reversed on appeal unless the district court's action was "'manifestly erroneous.'" *Koonce* v. *Quaker Safety Prods. & Mfg. Co.*, 798 F.2d 700, 721 (5th Cir. 1986) (quoting *Perkins* v. *Volkswagen of Am. Inc.*, 596 F.2d 681, 682 (5th Cir. 1979)); *Page* v. *Barko Hydraulics*, 673 F.2d 134, 139 (5th Cir. 1982); *see Bauman* v. *Centex Corp.*, 611 F.2d 1115, 1120 (5th Cir. 1980). Despite this broad discretion, we are mindful that district judges and appellate courts must carefully review an expert's testimony to ensure that the expert has the necessary qualifications and a sufficient basis for his opinion. *See Eymard* v. *Pan Am. World Airways (In re Air Crash Disaster)*, 795 F.2d 1230, 1233-34 (5th Cir. 1986).

1. *Specialization*

First, Dow complains that Dr. Teitelbaum was not qualified to render an opinion because he was not a specialist in any relevant field. Dow preserved this objection. *See* 6 R. 2-5, 28, 43-44. As noted above, Dr. Teitelbaum is a certified toxicologist.[3] The fact that Dr. Teitelbaum is not a specialist in any other field goes to the weight of his opinion, not its admissibility. *See Holmes* v. *J. Ray McDermott &*

[3] Dr. Teitelbaum is certified by the American Board of Toxicology. 6 R. 18-19. The American Medical Association does not certify doctors in toxicology. 6 R. 19.

Co., 734 F.2d 1110, 1115 (5th Cir. 1984); *see also Payton* v. *Abbott Labs*, 780 F.2d 147, 155-56 (1st Cir. 1985) (upholding the admissibility of two doctors' opinions over the objection that they were clinicians and not research scientists); *Ashland Oil, Inc.* v. *Delta Oil Prods. Corp.*, 685 F.2d 175, 178 (7th Cir. 1982) (upholding admission of expert's opinion despite his lack of specialization in a particular branch of chemistry), *cert. denied*, 460 U.S. 1081, 103 S. Ct. 1769, 76 L. Ed.2d 343 (1983); E. Cleary, *McCormick on Evidence* § 13, at 34 (3d ed. 1984) ("While the court may rule that a certain subject of inquiry requires that a member of a given profession . . . be called; usually a specialist in a particular branch within a profession will not be required." (footnote omitted)).

2. *Adequate Basis*

Dow next objects to Dr. Teitelbaum's testimony on the grounds that he had no adequate basis for his opinion. Specially, Dow argues that Dr. Teitelbaum's opinion was inadmissible because: (1) he never examined Greenhill personally, and (2) his opinion was based solely on information supplied by counsel. Dow's overall objection to Dr. Teitelbaum's qualifications properly preserved this issue. 6 R. 2-5.[4]

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[4] Dow, in its motion for summary judgment, also argued that Dr. Teitelbaum's testimony lacked a sufficient basis because he did not know of the extent or duration of Greenhill's exposure to 2, 4-D. Although Dow raised this objection in its motion for summary judgment, 2 R. 362-63, Dow failed to renew this objection either before or during Dr. Teitelbaum's testimony. Any error was therefore waived. *See* Fed. R. Evid. 103(a). Further, Dr. Teitelbaum testified that his opinion was based upon Mr. Greenhill's deposition. 6 R. 21. During his deposition, Mr. Greenhill testified as to the extent of his exposure to 2,4-D.

The Federal Rules of Evidence require that an expert's opinion be based on information "of a type reasonably relied upon by experts in the particular field. . . ." Fed. R. Evid. 703. In making this determination, the trial court should defer to the expert's opinion of what data they find reasonably reliable. *Greenwood Utils. Comm'n* v. *Mississippi Power Co.*, 751 F.2d 1484, 1495 (5th Cir. 1985); *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 277 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed.2d 538 (1986).

Our review of this error is hampered because neither the parties nor the court framed the issue in these terms. Indeed, the district court overruled Dow's objection without comment. 6 R. 6. This court suggested in *Greenwood* that, in the absence of an explicit factual finding on this issue, we must remand the case to the district court. *See* 751 F.2d at 1496. We do not believe a remand in this case is necessary, however. We may take judicial notice that the facts relied on by Dr. Teitelbaum are those usually considered by medical experts. *See United States* v. *Lawson*, 653 F.2d 299, 302 n. 7 (7th Cir. 1981), *cert. denied*, 454 U.S. 1150, 102 S. Ct. 1017, 71 L. Ed.2d 305 (1982).

The determination of whether an expert meets the requirements of Fed. R. Evid. 703 must be made on a case-by-case basis. *Soden* v. *Freightliner Corp.*, 714 F.2d 498, 502-03 (5th Cir. 1983). We review the district court's actions for abuse of discretion. *Id.* at 503.

Dow's first objection, that Dr. Teitelbaum never personally examined Mr. Greenhill, fails to hit its mark. A personal examination of the person or object of the expert's testimony is not required under Fed. R. Evid. 703. In *Sweet*

v. *United States,* 687 F.2d 246, 249 (8th Cir. 1982), the government's expert was permitted to testify about the possible effects of LSD on the plaintiffs even though he never examined them. Similarly, in *Data Line Corp.* v. *Micro Technologies, Inc.,* 813 F.2d 1196, 1200-01 (Fed. Cir. 1987), experts in a patent case testified without physically examining the cash register that allegedly infringed upon plaintiff's patent. *See* generally 3 D. Louisell & C. Mueller, *Federal Evidence* § 389, at 657 (1979) (rule 703 "diminishes the need for the expert to have firsthand knowledge concerning the matters in issue").

Dow's second objection, that Dr. Teitelbaum relied on information supplied by plaintiff's counsel in reaching his conclusion, also fails. This does not require the exclusion of the expert's testmony. *See Gideon* v. *Johns-Manville Sales Corp.*, 761 F.2d 1129, 1135 (5th Cir. 1985). A different result would infuse many personal injury suits with quite difficult issues of source tracing.

3. *Scientific Literature*

Dow next argues that Dr. Teitelbaum's testimony should have been excluded because the scientific articles on which he relied were published after Mr. Greenhill's exposure and, thus, could not form the basis of liability for inadequate warnings. This argument fails for two reasons. First, Dow never objected to Dr. Teitelbaum's testimony on these grounds; any error was waived. *See* Fed. R. Evid. 103(a). Further, while the scientific articles that post-dated Greenhill's exposure may not have been relevant to the adequacy of warnings, they were admissible on the issue of causation. *Cf. Challoner* v. *Day & Zimmermann, Inc.,* 512 F.2d 77, 79 (5th Cir.) (government study done after accident was

admissible on issue of whether ammunition shells were defective), *vacated on other grounds*, 423 U.S. 3, 96 S. Ct. 167, 46 L. Ed.2d 3 (1975).

Dow also complains in its brief that the scientific literature upon which Dr. Teitelbaum relied "dealt with disease entities which Greenhill did not have" or were "wholly irrelevant." During Dr. Teitelbaum's direct examination, Dow's counsel objected to the discussion of two scientific articles detailing neurological damage suffered by patients exposed to 2,4-D on the grounds that plaintiffs alleged no neurological illness.[5] Plaintiffs respond that the neurological symptoms described in these articles were similar to those experienced by Greenhill. Dr. Teitelbaum did not discuss any such link between the neurological studies and Greenhill's symptoms. Nevertheless, we cannot conclude that the admission of this evidence warrants reversal. *See Petty* v. *Ideco, Div. of Dresser Indus., Inc.*, 761 F.2d 1146, 1151 (5th Cir. 1985) (evidentiary rulings will be disturbed only if they result in substantial prejudice). Dr. Teitelbaum testified that numerous other studies linked 2,4-D and cancer. Use of the neurological damage literature did not substantially prejudice Dow.

4. *Cause of Hodgkin's Disease*

Dow next argues that Dr. Teitelbaum's causation testimony was inadmissible because he admitted that the cause

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[5] Dow's counsel also objected when another study linking cancer to exposure to phenoxyacetic acids was discussed. Dow objected on the grounds that such acids might differ from 2,4-D, and that the doctor's inference based on this study was speculative. 5 R. 85. The court overruled this objection. Dr. Teitelbaum then testified that 2,4-D was a phenoxyacetic acid. 6 R. 85-86. The trial court properly overruled the objection.

of 95% of all Hodgkin's disease cases is unknown. 6 R. 214. Dow properly preserved this objection. 6 R. 3. Dow, however, has mischaracterized Dr. Teitelbaum's testimony. The doctor clarified his statement by saying that the cause of more cases could be diagnosed if the cases were examined more carefully. 6 R. 214. This complaint goes to the weight rather than the admissibility of Dr. Teitelbaum's opinion.

5. "One-hit" Theory

Dow also objected to the admission of Dr. Teitelbaum's testimony on the grounds that his "one-hit" theory of causation was "specious." This theory suggests that one molecule of carcinogen, in the right place and at the right time, can cause cancer. 6 R. 133. Although Dow did file a pretrial motion to exclude Dr. Teitelbaum's testimony on these grounds, 1 R. 83-84, Dow failed to renew this objection during his testimony. Thus, Dow failed to preserve anything for review. *See Petty* v. *Ideco, Div. of Dresser Indus., Inc.*, 761 F.2d 1146, 1150 (5th Cir. 1985).

Even assuming that this error was preserved, the absence of a scientific consensus on a given theory does not affect the admissibility of an expert's opinion.

> An expert's opinion need not be generally accepted in the scientific community before it can be sufficiently reliable and probative to support a jury finding. . . . What is necessary is that the expert arrived at his causation opinion by relying upon *methods* that other experts in his field would reasonably rely on in forming their own, possibly different opinions, about what caused the patient's disease.

Osburn v. *Anchor Laboratories, Inc.*, 825 F.2d 908, 915 (5th Cir. 1987) (citations omitted). As discussed above,

Dr. Teitelbaum arrived at his opinions by relying on the same kind of information relied upon by other medical experts. His testimony was properly admitted.

6. *Dow Study*

Finally, Dow objects to Dr. Teitelbaum's testimony on the grounds that he was permitted to testify that 2,4-D contained impurities and that Dow's failure to report these impurities violated EPA regulations. Using a confidential Dow report, Dr. Teitelbaum testified that the 2,4-D produced at Dow's plant contained impurities, 6 R. 104-05, and that these impurities were contributing causes to Mr. Greenhill's cancer, 6 R. 106. Dr. Teitelbaum continued, testifying that EPA regulations require chemical companies to report the finding of impurities in their products, and that, to his knowledge, Dow never reported any finding of these impurities to the EPA. 6 R. 107-08. Dow's counsel repeatedly objected to this line of questioning on the grounds that it was speculative. 6 R. 106, 108, 109, 110.

Experts are entitled to rely on studies in forming their opinions. *See, e.g., Mannino* v. *International Mfg. Co.*, 650 F.2d 846, 851 (5th Cir. 1981); *Baumholser* v. *Amax Coal Co.*, 630 F.2d 550, 552-53 (7th Cir. 1980). Thus, Dr. Teitelbaum could use the Dow study to formulate his opinion on the toxicity of Tordon 101.[6]

More troublesome, however, was Dr. Teitelbaum's testimony implying that Dow violated the law by not reporting the impurities to the EPA. This testimony was admitted even though these questions were outside the doctor's ex-

[6] Tordon 101 is the brand name of the herbicide whose main ingredient is 2,4-D.

pertise and there was no evidence that he knew (1) whether the EPA had reporting requirements or (2) whether Dow complied with them. This was error, but we hold it to be harmless. Dow has not shown that Dr. Teitelbaum's testimony was either incorrect or known by Dr. Teitelbaum to be incorrect.

7. *Recent Decisions of this Court*

To support its argument that Dr. Teitelbaum's testimony should have been excluded, Dow relies on two recent decisions of this court, *Eymard* v. *Pan Am. World Airways* (*In re Crash Disaster*), 795 F.2d 1230 (5th Cir. 1986) and *Viterbo* v. *Dow Chemical Co.*, 826 F.2d 420 (5th Cir. 1987). Both of these cases fail to support Dow's contention. In *In re Air Crash Disaster,* the court held that the admission of an economist's testimony was error in a wrongful death action. The court found that the expert made assumptions that were inconsistent with common sense. For example, the economist assumed that the deceased's income would increase 8% annually for forty years, while his taxes would consume only 5% of his income. The court found both assumptions incredible. 795 F.2d at 1234. In *Viterbo,* the court upheld the exclusion of an expert's testimony because the plaintiff's medical history was incomplete in a "critical area," *i.e.*, the doctor failed to consider the history of hypertension and depression in the plaintiff's family history. 826 F.2d at 423 Dr. Teitelbaum's testimony did not suffer from any such defects that cast doubt on the validity of his testimony.

8. *Conclusion*

Based on our review of Dr. Teitelbaum's testimony and all of Dow's objections, we conclude that the district court

did not abuse its discretion or commit manifest error in admitting his testimony.

C. *Testimony of Kier and Tipton*

Dow next complains of the testimony of Andrew Kier and Paul Tipton, former United States Forest Service employees, who testified about the "hack and squirt" operations. The trial court's decision to admit lay opinion testimony will only be reversed for an abuse of discretion. *Scheib* v. *Williams-McWilliams Co.*, 628 F.2d 509, 511 (5th Cir. 1980). Kier testified that he had seen the task performed although he had never actually done it. *See* 5 R. 49, 56-57. He also testified that those who participated in hack and squirt operations were exposed to Tordon 101 and that it frequently got on their clothes and skin. 5 R. 51. Tipton testified that he had performed hack and squirt operations and described the process. 5 R. 65-66. Tipton testified that the men who applied the chemicals often were exposed to fumes and that the herbicide had splashed upon himself and other workers. 5 R. 67.

Dow objected to the admission of this evidence on the grounds that it was irrelevant, and because neither witness had seen Mr. Greenhill perform the hack and squirt operation. 5 R. 44-45, 62. The district court overruled the objections. 5 R. 46, 63.

The trial court's admission of this testimony was not error. Both witnesses testified generally about how hack and squirt operations were performed. Each was testifying from his own knowledge and spoke to his own observations. *See generally* E. Cleary, *supra*, § 10.

D. *Motion for New Trial*

Dow, in its next complaint, reveals more about the gamesmanship in litigation than it does about judicial error. It complains about the trial court's denial of its motion for new trial on the basis of newly-discovered evidence.[7] Dow claims that Dr. Teitelbaum testified falsely at trial about knowing a man named Joseph Moss. The facts surrounding this issue are somewhat confused. It seems that before Dr. Teitelbaum's deposition, his assistants collected three boxes of medical records regarding this case for the deposition. 6 R. 223, 224, 227. In one box of documents, the medical records of Mr. Moss, another of Dr. Teitelbaum's patients, were mistakenly included. *See* 6 R. 228. Dow's counsel noticed the error and asked Dr. Teitelbaum what records he relied upon in forming his opinion that 2,4-D caused Greenhill's cancer. The doctor expansively responded that he had relied upon all the documents in the room. 6 R. 233. Dow's counsel then had a stack of documents, including Moss' records, marked as "exhibit 2."

At trial, Dow's counsel produced exhibit 2 and asked Dr. Teitelbaum if he had relied on those records. Dr. Teitelbaum apparently became confused when he saw the Moss records contained in exhibit 2 and stated that he did not know Joseph Moss. 6 R. 219-21. This testimony was false since Moss was a patient of Dr. Teitelbaum.

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[7]. Dow also contends that the district court erred in overruling their motion for JNOV for the same reasons. A motion for JNOV should be granted when there is insufficient evidence to support the jury's verdict. *See Kendrick* v. *Illinois Cent. Gulf R.R.*, 669 F.2d 341, 343 (5th Cir. 1982). A motion for JNOV is not the proper remedy for Dow's claim. Thus, the district court properly denied Dow's motion on this ground.

Eventualy, the trial court intervened. In response to the judge's questions, Dow's counsel admitted that he realized during the deposition that Dr. Teitelbuam's assistants had mistakenly included Moss' medical records, which had nothing to do with the Greenhill case. 6 R. 234. He stated he was trying to show that Dr. Teitelbaum made a mistake. 6 R. 239. After the controversy subsided, on redirect examination Dr. Teitelbaum reiterated that his opinion was based on Greenhill's medical records. 6 R. 228, 232.

We will not overturn the district court's refusal to grant a motion for new trial on the basis of newly discovered evidence absent a clear abuse of discretion. *Osburn* v. *Anchor Laboratories, Inc.*, 825 F.2d 908, 917 (5th Cir. 1987). In determining whether to grant this motion, the district court should "consider whether the new facts (1) would probably change the outcome; (2) could have been disovered earlier with due diligence; and (3) are merely cumulative or impeaching." *Johnston* v. *Lucas*, 786 F.2d 1254, 1257 (5th Cir. 1986).

Applying this standard, the district court properly denied Dow's motion. That Dr. Teitelbaum erroneously claimed not to know Joseph Moss could not have affected the outcome of the trial. Dow's counsel knew of the source of the mistake from an early point in the litigation. In his cross-examination of Dr. Teitelbaum, Dow's counsel effectively revealed that the doctor testified in hundreds of trials. 6 R. 140. The further revelation that Dr. Teitelbaum had forgotten the name of one patient could not have affected the jury's verdict. Dow was not hurt by Dr. Teitelbaum's confusion. *Compare Harre* v. *A.H. Robbins Co.*, 750 F.2d 1501, 1505 (11th Cir. 1985) (plaintiff was entitled to a

new trial based on evidence that doctor falsely testified that he had supervised experiments on IUDs).

E. *Motion to Transfer Venue*

Dow's third ground of error complains of the district court's denial of its motion to transfer venue to Oregon under 28 U.S.C. § 1404(a) (1982). 3 R. 671-80. A motion to transfer venue is addressed to the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *Marbury-Pattillo Constr. Co.*, v. *Bayside Warehouse Co.*, 490 F.2d 155, 158 (5th Cir. 1974). The trial court must consider "all relevant factors to determine whether or not on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum." 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3847, at 370 (1986).

After reviewing the record, we conclude that the district court did not abuse its discretion in denying Dow's § 1404(a) motion. To begin, the plaintiff is generally entitled to choose the forum. *See Menendez Rodriguez* v. *Pan Am. Life Ins. Co.*, 311 F.2d 429, 434 (5th Cir. 1962) (plaintiff's choice of forum should be "highly esteemed"), *vacated on other grounds*, 376 U.S. 779, 84 S. Ct. 1130, 12 L. Ed.2d 82 (1964). Second, Dow's motion to transfer venue would have caused yet another delay in this protracted litigation. Dow's motion to transfer venue was not filed until eighteen months after the case was remanded to the Eastern District of Texas. 3 R. 671. Parties seeking a change of venue should act with "reasonable promptness." 15 C. Wright, A. Miller & E. Cooper, *supra*, § 3844, at 335-37. Courts have considered a party's delay in denying

a motion to transfer. *See, e.g., McGraw-Edison Co.* v. *Van Pelt,* 350 F.2d 361, 364 (8th Cir. 1965); *Meinerz* v. *Harding Bros. Oil & Gas Co.,* 343 F. Supp. 681, 682 (E.D. Wis. 1972). Finally, Dow made no showing that Oregon was a more convenient forum.

Dow, relying on *Trivelloni-Lorenzi* v. *Pan Am. World Airways (In re Air Crash Disaster),* 821 F.2d 1147 (5th Cir. 1987), complains vigorously that the trial court erred in not articulating in its order the specific facts and circumstances upon which it relied in denying Dow's motion. *See* 3 R. 563. While we recognize that this would be the better practice, *see, e.g., In re Pope,* 580 F.2d 620, 623 (D.C. Cir. 1978); *Plum Tree, Inc.* v. *Stockment,* 488 F.2d 754, 756 (3d Cir. 1973), and that the trial court inexplicably did not articulate its reasons for its rulings, we decline to impose an inflexible rule requiring district courts to file a written order explaining their decisions.

Dow's reliance on *In re Air Crash* is misplaced. In that case this court required district courts in denying a motion to *dismiss* on the grounds of *forum non conveniens* to file a written order or to make a statement on the record explaining its denial. *See* 821 F.2d at 1166. Needless to say, a motion to dismiss on grounds of forum non conveniens implicates different interests than a motion to transfer venue. The Supreme Court has stated that these two motions are not "directly comparable." *Piper Aircraft Co.* v. *Reyno,* 454 U.S. 235, 258 n. 26, 102 S. Ct. 252, 267 n. 26, 70 L. Ed.2d 419 (1981); *see also* 15 C. Wright, A. Miller & E. Cooper, supra, § 3847, at 372-75 (discussing the differences between motions to transfer venue and motions to dismiss on grounds of forum non conveniens). The trial court did not abuse its discretion in denying Dow's motion to transfer venue.

F. *The District Court's Actions*

In its final ground of error, Dow charges that the district court's "overall supervision and management of this case deprived Dow of a fair trial." In this portion of its brief, Dow simply catalogues a number of adverse rulings by the trial court. We have examined the record and, while not entirely happy with what we see, we find no basis for this charge. The trial was fair although not perfect.

G. *Dow's Reply Brief*

Dow raises four additional grounds of error in its reply brief. We may not review arguments raised for the first time in the appellant's reply brief. *Light* v. *Blue Cross & Blue Shield, Inc.*, 790 F.2d 1247, 1248 n. 2 (5th Cir. 1986); *United States* v. *Birdsell*, 775 F.2d 645, 655 n. 4 (5th Cir. 1985), *cert. denied*, 476 U.S. 1119, 106 S. Ct. 1979, 90 L. Ed.2d 662 (1986); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure*, § 3974, at 428 (1977). We do not reach these issues.

The judgment of the district court is AFFIRMED.

Court of Appeals Order Denying Rehearing

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-6314

ALLEN PETEET, et al.,

Plaintiffs,

ANN I. GREENHILL, Individually and on Behalf of the Heirs of the Estate of JAMES EDWARD GREENHILL, Deceased,

Plaintiffs-Appellees,

versus

DOW CHEMICAL COMPANY,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

Court of Appeals

Filed
June 6, 1989

Gilbert F. Ganucheau
Clerk

Court of Appeals Order Denying Rehearing

ON PETITION FOR REHEARING

(June 6, 1989)

Before:

GEE, SNEED,* and WILLIAMS, *Circuit Judges*

Per Curiam:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

*Circuit Judge of the Ninth Circuit, sitting by designation.

Entered for the Court:

. . . . . .

United States Circuit Judge

District Court Order Denying Post-trial Motions

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION
No. M-79-79-CA

ANN I. GREENHILL, Individually and on Behalf of the Heirs of the Estate of JAMES EDWARD GREENHILL, Deceased,

v.

DOW CHEMICAL COMPANY,

ORDER

It is the ORDER of this Court that Defendant's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a new Trial be and hereby is OVERRULED.
Signed this the 19 day of February, 1988.

.....
U. S. District Judge

Excerpts from Record Below

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

MARSHALL DIVISION

C.A. No. M-79-79-CA

ALLEN PETEET, et al.,
(JAMES EDWARD GREENHILL),

v.

DOW CHEMICAL COMPANY, et al.,

DEPOSITION OF DR. DANIEL T. TEITELBAUM

DEPOSITION AND ANSWERS OF DR. DANIEL T. TEITELBAUM, taken before Laurie V. Carlisle, a certified shorthand reporter and notary public in and for Harris County and the State of Texas, in the Hobby Airport Hilton Hotel, Airport Boulevard, beginning at 10:45 a.m., on the 15th day of June A.D. 1987, pursuant to the Federal Rules of Civil Procedure and the following stipulations and waiver of counsel, viz.:

* * *

Q. Is there anything that you reviewed in preparation for this deposition which is not before you in this room?
A. No, sir, not a thing.

Q. Didn't Mr. Baldwin show you a few documents just a few moments ago?
A. That's not a review of documents. He showed me some things.

Excerpts from Record Below

Mr. Baldwin: I showed him documents which y'all produced us which he had not seen before, at least I had not shown him before.

A. (Continuing) That's not a review, Mr. Pierce. One of them said open document that the EPA published about pesticide poisoning which of course I had. I mean really.

Q. It's just a question. All you have to do is answer. You don't have to get defensive.

A. I understand. I'm not the least bit defensive. That's not a review, and you and I both know that.

Q. Can you now show us the totality of the medical records that you reviewed in formulating your opinion?

A. It's right here.

Mr. Pierce: Could we please mark that as Exhibit 2.

(Exhibit was marked for identification by the reporter as Deposition Exhibit 2 and is attached hereto.)

Q. (By Mr. Pierce) And in terms of the literature that you say suggest some type of association between either 2,4-D and picloram and Hodgkin's disease—

A. Just a minute, Mr. Pierce. You keep doing that, and I'm not going to let you. I didn't say picloram. I said 2,4-D. You said picloram. I will be happy to accept it if you believe picloram is associated; but that's your belief, not mine at this point.

Q. Okay. Could you show us where you have the literature which you believe—

A. I have a big box here on the floor with all of my literature which deals with basic science material on 2,4-D, and here is the literature which deals with the specific issue of . . .

* * *

Excerpts from Record Below

Q. What is your engagement letter?
A. Engagement letter is a contract which Denver Clinic produces and executes between an attorney who refers a case to Denver Clinic and the clinic.

Q. That's Denver Clinic, P.C. Is that correct?
A. That's correct.

Q. And is the same contract in force today?
A. The rates have gone up since 1985, I believe. I don't know which contract this was.

Q. What are your current rates, sir?
A. The current rate is $3500 per day and $400 per hour.

Q. Do you still have a half day rate?
A. Yes. $2,000. Still less than your experts charge by about a thousand dollars a day.

Q. What was supplied to you at the time you were contacted in 1985?
A. The medical records were supplied at that time.

Q. Which medical records were supplied?
A. The folder, the file that you've looked at before.

Q. Let's identify that.

Mr. Baldwin: Exhibit 2. It's already been marked.

Q. (By Mr. Pierce) Was the entire Exhibit 2 supplied to you at that time?
A. I cannot answer that question. I do not know. I can't tell you what was supplied or what was not. My assistant only indexed it completely this year, so I don't know when each piece came in.

Q. What did you do with the materials you received in 1985?
A. Basically, I had a quick look at it and filed it away until it was appropriate to review it since at that time there

was no particular urgency to do anything.

Q. When was your next contact with anyone in respect to this litigation?

A. In the spring of this year.

Q. When was that, sir?

A. I can't tell you exactly.

Q. Is there anything in Exhibit 4 which would help you refresh your recollection?

A. Perhaps. I think I received some notes from Mr. Baldwin approximately March of 1987.

Q. So between December '85 and March of 1987, . . .

* * *

Q. Do you know if Mr. Greenhill went to a dentist?

A. I have Dr. Walters' records—I'm sure he went to a dentist.

Q. Do you know how many x-rays he had taken?

A. No.

Q. X-rays are carcinogens, aren't they?

A. Yes. Just to clarify the question, I have Dr. Walters' record and it goes back to 1957 and I do not recall that I found a single chest x-ray or anything that would be of any consequence at all in that record. So we at least have that.

Mr. Pierce: Let's take a break at this point.

(A short break was taken.) . . .

Excerpts from Record Below

TRANSCRIPT OF TRIAL PROCEEDINGS

VOLUME 2 of 3

(December 1, 1987,—9:00 A.M.)

Q. (By Mr. Pierce) Do you know if Mr. Greenhill smoked, Doctor?

A. I'd have to look again and see. I believe he did, but I'm not certain.

Q. Do you know if he drank?

* * *

Q. Now, Doctor, I am going to ask you a question based on some facts. I am going to ask you based on the review of Mr. Greenhill's medical records, and Mr. Greenhill's history of exposure to 2, 4-D, as you've understood it from the testimony in this case, his deposition, the slides of Mr. Greenhill that you reviewed, the pathological reports that you've seen, had an opportunity to review, the other medical records of Mr. Greenhill, the literature that you have reviewed here today and other literature, and the Krummel report which was a Dow report about the impurities that you testified about just before lunch, and further, based on your knowledge and your experience and skills as a physician and a toxicologist, I am going to ask you, sir, based on that do you have an opinion, based on reasonable medical certainty, that the exposure of Mr. James Greenhill to Tordon 101 manufactured by the Dow Chemical Company was a significant, contributing cause of his cancer and death?

A. Yes, I have an opinion about that.

Q. And what is your opinion?

A. My opinion is that to a reasonable medical certainty,

Mr. Greenhill's exposure to Tordon 101 and 2, 4-D was a significant, contributing cause to his cancer and his death.

Mr. Baldwin, Sr.: We pass the witness, Your Honor.

Mr. Ortego: May I, Your Honor?

* * *

(Recess at 3:44 p.m., until 3:55 p.m.; open court, jury and all parties present.)

The Court: Please be seated. You may continue.

Mr. Ortego: Thank you, Judge.
(Mr. Ortego continuing:)

Q. I believe you said earlier, Dr. Teitelbaum, as we discussed at your deposition that Mr. Greenhill had some x-rays taken of him?
A. Yes.

Q. And that you knew that from his medical records is where you came up with that?
A. Yes. He had x-rays taken when he was admitted to the hospital, and he had some taken by Dr. Cole somewhere along in there.

Q. He also had, you described at your deposition when you were discussing Mr. Greenhill, his dental history, and you described Dr. Walters' records, did you not?
A. I think Dr. Walter was his general practitioner.

Q. And at your deposition we discussed Dr. Walters?
A. I think so, yes.

Q. And we attached those records at your deposition, the medical records you relied upon as an exhibit to your deposition, and Dr. Walters' records were in there, weren't they?

A. Yeah, I believe so.

* * *

Q. If you rendered an opinion on medical records that did not belong to Mr. Greenhill, would that have been a serious error?

A. No, not particularly, unless they had something of consequence.

Q. Let me show you what is marked as Exhibit No. 1, which is your deposition exhibit that you brought to your deposition, medical records that you looked at. These were some of the medical records that you perused at your deposition when I would ask you questions.

A. I have no way of answering whether these have anything to do with Mr. Greenhill at all. They don't look at all familiar to me.

Q. Well, in fact they aren't Mr. Greenhill's records and the records that we discussed at your deposition and I asked you questions from, and the records you brought weren't Mr. Greenhill's records.

A. These are not records which I supplied to you. I'm sorry, these are not my records. I have a copy of my records here, and these are not the records which I gave to you. I have no idea where you got those.

Q. Those records, Mr. Moss, is he another legal file of yours?

A. I never heard his name.

Q. And those records—Mr. Moss is a much older man than Mr. Greenhill, wasn't he?

A. I haven't the faintest idea whose records these are. They are not Mr. Greenhill's. They have nothing to do with this case. I don't know anything about them.

Q. As a matter of fact when I asked you this question at your deposition—

Excerpts from Record Below

Mr. Baldwin, Sr.: What page?
Mr. Ortego: Page 101.

Q. "Do you know if Mr. Greenhill went to a dentist?" "I have Dr. Walters' records. I am sure he went to a dentist." "Do you know how many x-rays he had taken?" "No." "X-rays are carcinogens, aren't they?" "Yes. Just to clarify the question, I have Dr. Walters' record and it goes back to 1957, and I do not recall I found a single chest x-ray or anything that would be of any consequence at all in the record. So we at least have that."

Take a look at those records that are in front of you, when I was asking you questions and you were referring to out of your deposition, isn't it a fact that Dr. Walters is in that client's file and there is no Dr. Walters even in Greenhill's file?

A. Excuse me. I don't know who Mr. Moss is. I—I don't have any record. I don't know this man. I don't know anything about it.

Q. Those are the records that were attached to your deposition as Exhibit 2, and you referred—

A. These are not Mr. Greenhill's records, and I have no idea where they came from.

Q. They are not, are they? And look through quickly, is Dr. Walters the dentist in 1947 when Mr. Greenhill was a boy, that's really Dr. Walters', when you went through those records that you personally brought to the deposition, you were referring to the wrong man's medical records?

A. Excuse me. These are not Mr. Greenhill's records.

Q. I know that.

A. They have nothing to do with this case. I don't know who Mr. Moss is, and I really do not know where you got this.

Excerpts from Record Below

Q. I got those, the Court can take notice, it's attached to your deposition as Exhibit 2, and I'll read the lines. Is there a Dr. Walters in there, a dentist Dr. Walters? Take a look.

A. I don't see it (examining file). Well, I do not see it, and I do not recognize these records. I do not know anything about this patient.

Q. So if the exhibits which were attached to your deposition which you produced, those records, if you relied upon them, would have been a mistake, wouldn't they?

A. These records don't have anything to do with Mr. Greenhill. I don't know what—

The Court: Just a minute. Let me see those records.

Mr. Ortego: They don't, Your Honor. They have nothing to do with Mr. Greenhill. (Tenders exhibits to the Court.)

The Court: I am looking at Defendant's Exhibit 1.

Mr. Ortego: Which is Deposition Exhibit No. 2, Your Honor.

The Court: Where did these—this is a Joseph Moss.

Mr. Ortego: That's right. At the deposition of Dr. Teitelbaum—

The Court: Well, let me ask a question a minute. Are you stating to the Court that these exhibits, this Defendant's Exhibit 1, was a part of the deposition of Dr. Teitelbaum?

Mr. Ortego: Yes, it was, Your Honor.

The Court: Mr. Baldwin, is that correct?

Mr. Baldwin, Sr.: Your Honor, I don't know. At that deposition there were boxes of documents

furnished. They may well have been. I have never seen them before.

Mr. Ortego: Judge, I think there were four exhibits or so, or a little more, at the deposition.

The Court: Well, are you stating that the—

Mr. Ortego: Yes, Judge.

The Court: —that the witness testified from a series of documents of a person other than the Plaintiff, Mr. Greenhill, in this case?

Mr. Ortego: Yes. Yes, Your Honor.

The Court: Well now, the witness says he's never seen these, this Defendant's Exhibit No. 1 before.

Mr. Ortego: They are attached to his deposition, and we have a certified copy of the court reporter. These are the exhibits he produced. The exhibits were given to the court reporter at the deposition.

The Court: Who gave them to the court reporter?

Mr. Ortego: She took them from the deposition. She marked them and took them. I never touched them.

The Witness: I never touched them.

Mr. Ortego: And, Judge, I was at the deposition and when those documents were brought in by Dr. Teitelbaum I took the documents. He put them on the table, and I looked at them.

The Court: Where are the medical records of Mr. Greenhill that the witness had before him when his deposition was taken?

Mr. Ortego: That was Exhibit 4, and he discussed those records as well at his deposition.

The Witness: Your Honor, I have never seen that record before, and my office sent three boxes of material down. The Defendants asked that that be

left and they would go through it. I have no idea what was in those boxes.

The Court: Have you ever seen this exhibit before?

The Witness: Not that I can recall, Your Honor. I don't know who Mr. Moss is, and I have no recollection at all of that.

The Court: Have you ever testified from this Defendant's Exhibit 1 before with reference to a man named Joseph Moss?

The Witness: I have no idea who Mr. Moss is. I have never had anything to do with him.

Mr. Ortego: Judge, just for the deposition (sic), I did not take the deposition. I handed that to the court reporter when Mr. Teitelbaum gave it to me and had her mark it.

The Witness: I didn't give them anything, Your Honor. There were three boxes there.

The Court: Well, Mr. Teitelbaum says he didn't give that to you.

Mr. Ortego: Fine, Judge, I won't—I won't pursue this anymore.

The Court: Well, where did you get it? Where did you get those records?

Mr. Ortego: Dr. Teitelbaum at his deposition, Your Honor. They were put on the table, I reviewed them, and then we questioned him.

The Court: I mean, I don't want any hanky-panky here in this court. There is not—

Mr. Ortego: There's no—

The Court: There's not going to be any.

Mr. Ortego: No, Judge, I am not being hanky—

Excerpts from Record Below

The Court: And if I find out there is some going on—

Mr. Ortego: There was not, Your Honor.

The Court: —there will be a hereafter to this session—

Mr. Ortego: I give my word as an attorney.

The Court: —today.

Mr. Ortego: No, Judge, there was not. These were the deposition exhibits that were marked. I was there and I watched it. I'll—I'll withdraw this line of questioning anyway, because if it's upsetting the court it's not worth it.

The Court: It's not upsetting me. I am just wanting to be sure that the proper reports that this witness examined are the reports that are being given to him now.

Mr. Ortego: Judge, that was the exhibit that was marked. It came back from the stenographer. I personally looked at those exhibits at the deposition, and I was as surprised as you were when I saw them. And then my partner asked him questions at the deposition, and we handed those and asked if he relied on those records, and he relied on those records. That's why they were individually marked at the deposition.

Mr. Baldwin, Sr.: Well, I can say as an officer of the court, he never mentioned the fact at this man's deposition about any records belonging to a Dr. Moss, nor did he ask him any questions about it. His deposition is here and speaks for itself.

Mr. Ortego: I just asked at his deposition, asked: "Did you rely on these records? Do you have any

x-rays?" And Dr. Teitelbaum looked through Exhibit 2 and told us about Dr. Walters. That's where that came from, Judge. I don't want to cause any trouble with the Court.

The Court: Were any questions ever asked of this witness when his deposition was taken about anyone named Joseph Moss?

Mr. Ortego: Not by name, Judge, not by name. I asked him to review the records and asked what he had.

The Court: Well, who took the deposition for the Defendants?

Mr. Ortego: Mr. Pierce.

The Court: Where is he?

Mr. Pierce (from the floor) I am here, Your Honor.

The Court: Don't leave.

Mr. Pierce: I won't.

* * *

Excerpts from Record Below

TRANSCRIPT OF TRIAL PROCEEDINGS

VOLUME 3 of 3

(December 2, 1987,—8:55 A.M.)

(Open court; jury not present)

The Court: Please be seated. I have been handed a Requested Special Instruction this morning by the Defendant in which the Plaintiff has an objection. So we will hear this motion at this time. Who wishes to present it? Mr. Brown, I think it bears your signature.

Mr. Brown: On behalf of the Defendant Dow Chemical the Defendant has requested what has been marked and provided the Court as Defendant's Special—Requested Special Instruction No. A. This goes to the matter which occurred yesterday in court in the presence of the Jury, primarily the questions from the bench regarding whether or not there was, I believe the term was used, "hanky-panky" involved in regard to the medical records which were handed to Dr. Teitelbaum of an individual not—other than Mr. Greenhill, I believe a Mr. Moss.

Outside the presence of the Jury, I believe through the use of the deposition of Dr. Teitelbaum, it was determined that the exhibit was in fact marked at the deposition, was in fact handled by Plaintiffs' counsel, was reviewed by the witness himself in that he handled the exhibit, located the records involved, that is the record of a Dr. Watson regarding x-rays from dental care, and that also here before the—in front of the Jury during the testimony there was testimony, as I recall, from the

witness that Dr. Walters was Mr. Greenhill's family physician, I believe was the witness's recollection.

I believe outside the presence of the Jury it was determined that in fact the proper procedures were followed, that this in fact was an exhibit which the witness did see, he had handled, thumbed through to in fact find the very record that he testified from not only on deposition but that he again referred to or was the basis of his statements in court that Dr. Walters was a physician of the deceased, when in fact, I believe it is undisputed, that the records simply were not such records.

This evidence, of course, was introduced only for the purpose to test the reliability of the witness as far as what was the basis of his opinions. Certainly the review of the medical records was a substantial foundation for his opinions given in this courtroom. And, therefore, we feel because the Jury was not privy to the discussions before the Court, outside their presence, which in effect cleared up this matter as far as whether this exhibit was properly marked, Defendant's concern is that there is prejudice to the Defendant Dow Chemical in that all the Jury heard was from the Court a concern—is there something out of order, is there hanky-panky, implying someone may have done something wrong.

We feel that this is a curative instruction to cure that prejudice or whatever might be in the minds of the jurors as they were not privy to what eventually was shown to the Court; and in that regard, request the Court to read before we put on our case in chief the Requested Special Instruction No. A.

The Court: Thank you.

Mr. Baldwin, Sr.: Your Honor, I just have this comment, that the Jury heard what went on and the Jury has the opportunity to evaluate what went on. I think to give an instruction would be a comment on the weight of the evidence. They have waited until after Dr.—they agreed to excuse Dr. Teitelbaum to bring these matters up, that he could very easily have answered; and so we oppose it.

But I would say this, that if the Court feels disposed to give the instruction, I think it should be changed to where it would read as follows: "You are instructed that in regards to the record presented to the witness yesterday of an individual other than Mr. Greenhill, there was no misconduct by any witness or by any party or witness, and proper procedures were followed by the attorneys and the witness at the deposition of the witness, as well as during our proceedings here in court."

Otherwise, it would make it look like Dr. Teitelbaum did something wrong, and you are instructing the Jury these guys didn't do anything wrong, and I think they did because they asked him about—they apparently knew themselves that there was some record in there about somebody that didn't have anything to do with this lawsuit. The right thing and the gentlemanly thing and the proper thing as an ethical attorney should have been: "Dr. Teitelbaum, we have records here that seem to relate to some other patient. Do they have anything to do with this case?" And given him a fair opportunity to say that yes, they do, or no, they don't.

But they didn't do that, they hid that fact from Dr. Teitelbaum. You can read the deposition, and

the witness's name was never once mentioned. They say I handled the documents. I don't think I did. I was there, but if I did handle the documents I sure didn't see any reference to any other witness; and I am satisfied I didn't.

They have known this, apparently, since that time. They never told me about it. The Court has asked us to exchange documents. They have never said, "Mr. Baldwin, we are going to use these documents." Up until the time they hit the stand yesterday was the first I ever knew about those documents, and I think the first Dr. Teitelbaum ever knew about them. And I think it borders on not fair play. And so I am not prepared to agree that they acted properly in the matter. But if the Court feels differently and wants to instruct the Jury, then I think the fair thing is to instruct the Jury that the witness also acted properly.

Mr. Brown: Your Honor, might I respond briefly?

The Court: Yes.

Mr. Brown: Three brief points: First off, I believe it is within the province of the judge to comment on the weight if he so chooses in federal court.

Secondly, as far as any ethical obligation, I am not aware under our canons of any ethical obligation that would have been put on the counsel for defendant to in fact correct a mistake of the Plaintiff when his counsel was present—I mean the Plaintiff's witness.

As far as Mr. Baldwin's handling the documents, I don't know that he handled them. I believe that the deposition transcript reads from Mr. Baldwin's

statement: "No. 2, that's already in evidence. Here it is." Something to that effect.

Defendant has no problem with the change requested by Plaintiffs so that there will be no question there was no conduct either on the part of Dr. Teitelbaum or any parties.

The Court: Mr. Baldwin, prepare the—present to the Court what you just indicated and I will grant it. But I will read it not at this time but I will read it at the time the Court's Charge is given. So prepare what you have just indicated and submit it to the Court.

Mr. Baldwin, Sr.: All right, sir.

The Court: Call the Jury in. Anything else?

Mr. Ortego: No, Your Honor. Mr. Baldwin, I am going to introduce 1 and 2, the medical records we talked about and the Death Certificate before I call my first witness.

Mr. Baldwin, Sr.: Your Honor, while the Jury is out—

(Jury entering courtroom)

The Court: Wait a minute. Go back out. Something has come up, please.

(Jury exiting courtroom)

Mr. Baldwin, Sir.: While the Jury is retired it would seem to be an appropriate time to take up the question that was brought up late yesterday afternoon, and that is I told the—on the question of whether the Oregon law or Texas' law applied. I told Counsel for the Defendant that I would agree that either the Texas' law applied or the Oregon

law applied, whichever they wanted. And he was to talk to his client and inform the Court as to what his position was. And I think that we ought to get that matter cleared up.

We are certainly agreeable to let the Oregon law apply. They seemed to indicate yesterday they now wanted . . .

* * *

spouse and children of James Edward Greenhill would, in reasonable probability, have received from James Edward Greenhill.

f) the loss of companionship and society of James Edward Greenhill to his spouse and child.

You are instructed that loss of companionship and society is defined as the positive benefits flowing from the love, comfort, companionship, and society that the spouse and child of James Edward Greenhill would, in reasonable probability, experience if James Edward Greenhill had lived.

You may award such sum of money, if any, if paid now in cash, that you find from a preponderance of the evidence would fairly and reasonably compensate the Plaintiff for his injuries which were produced by the defect, if any, of the product in question.

Ladies and gentlemen, now in fairness to all the parties, you are instructed that in regard to the records presented to the witness, I think it was Tuesday, of an individual other than Mr. Greenhill, I think it was Mr. Moss, if I remember correctly, there was no misconduct by any party or witness and all proper procedures were followed by the attorneys and the witness at the deposition of the

witness as well as during the proceedings here in court. So disabuse your mind of that altogether.

* * *

Q. In addition to the lawsuits, you do consulting?
A. Right.

Q. And you charge for that. You do reviewing of medical records that aren't in a lawsuit yet, and you do literature searches for lawyers to get their lawsuits ready, and that doesn't consider a case that you have for a year?
A. No. That's not my work. That's other peopies' work, so don't put that on me.

Q. It's in your clinic?
A. But that's not mine. I don't get that money.

Q. You also review your paralegal's work at your clinic, don't you?
A. I don't review her work. She does her own work. And I don't get that money, either.

Q. Well, wouldn't it be fair to say, Doctor, that you make a pretty good living out of testifying?
A. I make a pretty good living but not out of testifying. My income is about $150,000 a year, total income from everything that I do.

Q. And more than half of that income is from testifying?
A. No, about half of it.

Q. About half of it.
A. And not from testifying. From all of my medical-legal work.

Q. How did you get to Marshall, Texas?

* * *

which includes medical-legal, government agencies, business consulting—anything other than direct patient care.

Q. Okay, we will go on with that more. Now, you have

a flat rate, isn't it correct that when you have one of your cases if you are scheduled for a deposition, there is a minimum half a day charge?

A. That's correct.

Q. And if it goes after a certain amount of time, it goes to the full day charge?

A. That's right.

Q. If the deposition gets cancelled, I think you have an elaborate system here. If the deposition gets cancelled more than one week prior, you still charge $300; if it gets cancelled forty-eight hours before, you charge one-half the schedule charge agreement; and if it gets cancelled less than forty-eight hours, you must pay a full amount for the day, is that correct?

A. That's correct.

Q. Is it fair to say, Doctor, that you average—you are deposed on the average of 25 times a year?

A. That's about right.

Q. And when I say "deposition," that's testimony that you give in a legal proceeding?

A. Not necessarily. It may be a regulatory agency; it may be some other kind of thing. But it's a legal, formal . . .

* * *

$600 an hour after five o'clock?

A. No, sir, because if I am working after five o'clock it's because we've got a full day's work, and that's at the daily rate.

Q. Okay. Take a look at this. And you have paralegals who work for you?

A. I have one paralegal who works for the Denver Clinic, not for me.

Q. How much does the paralegal charge?

A. I really don't know what rate was quoted there. About

$80 an hour, if I recall.

Q. So your paralegals get approximately—your paralegal—gets approximately $80 an hour?

A. That's what the Clinic charges, yes.

Q. Do you have any lawyers in your Clinic?

A. No.

Q. Just doctors?

A. Just doctors.

Q. Now you also charge for your travel time, don't you?

A. The charge for travel time is the same as any other time.

Q. Do you charge for your expenses?

A. Expenses are charged for.

Q. Okay. And expenses other than travel, you had a 50 percent surcharge on that?

* * *

A. That's right.

Q. Dr. Teitelbaum, you believe in what is known as the "one-hit theory" when it comes to cancer, isn't that correct?

A. Yes.

Q. So your belief is that one molecule of a carcinogen substance, meaning one molecule of any cancer-causing substance, can cause cancer in a human being if that molecule is at the right place and the right time?

A. It's a very simplified version, but, in general, that's correct, that the ultimate trigger for the development of cancer is the interaction between one molecule of the carcinogen and one molecule of DNA that's correct.

Q. Let's talk a little briefly about—we'll get back to that. When was the first time that you were contacted in this case?

A. In 1985, December, I believe.

Q. And you didn't do any work on this case until the

spring of 1987?
A. That's correct.

Q. And you never spoke to Mr. Greenhill, did you?
A. That's right.

Q. You never spoke to Mrs. Greenhill?
A. That's correct?

Q. You never spoke to any of Mr. Greenhill's family members?
A. That's correct.

Q. And you never spoke to any of his doctors?
A. That's correct.

Q. In fact, you didn't even know that you were named as a witness in this case until we took your deposition in June of 1987?
A. That's correct.

Q. But back in December of 1985 you and Mr. Baldwin both signed a retainer agreement?
A. That's correct.

Q. That agreement isn't good today, is it?
A. It's—

Q. Well, let me rephrase it.
A. I am not sure I understand the question.

Q. Your rates have gone up since 1985?
A. I don't know what—my rates have not changed in about two years. If you will tell me what rates are quoted there, I will tell you whether the Denver Clinic has raised the rate or it hasn't raised the rate.

Q. Let's talk about a little how much you charge. How much do you get a day?
A. The Denver Clinic charges $3,500 per day for every senior physician's time; that's myself and anyone else.

Q. Let's stop a little with the Denver Clinic. You are a partner of the Denver Clinic?

* * *